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IN THE

Supreme Court of the United States

October Term, 1967

No. 763

HOWARD L. HOLTZENDORFF and BARBARA ROSIEN,
Plaintiffs and Respondents,

vs.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a body corporate and politic,
Defendant and Appellant.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a body corporate and politic,
Cross-Complainant and Respondent,

vs.

HOWARD L. HOLTZENDORFF,
Cross-Defendant and Appellant.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Four.

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IN THE

Supreme Court of the United States

October Term, 1967
No. .....

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a body corporate and politic,

Petitioner,

vs.

HOWARD L. HOLTZENDORFF and BARBARA ROSIEN,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Four.

The Housing Authority of the City of Los Angeles hereby petitions for a Writ of Certiorari to review the decision of the Court of Appeal of the State of California, Second Appellate District, Division Four, entered in this case May 1, 1967.

Opinions Below.

The Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, is reported in 250 A.C.A. 667, 58 Cal. Rptr. 886 (1967). This Opinion affirms the judgment rendered in the Superior Court of the State of California, for

the County of Los Angeles November 10, 1964, awarding the amount of $218,199 in money damages against Petitioner, Housing Authority of the City of Los Angeles and $36,537.17 against the Respondent Holtzendorff in favor of Petitioner. The Opinion of the Court of Appeal is attached hereto as Appendix A. A Petition for Rehearing in the California Court of Appeal was denied May 18, 1967 and a Petition for Hearing to the Supreme Court of the State of California was denied June 28, 1967.

Jurisdiction.

The decision of the California Court of Appeal in this case was rendered on the 1st day of May, 1967. Petition for Rehearing within the time allowed therefor by rule of the Court was filed and said Petition was denied May 18, 1967. A Petition for Hearing to the Supreme Court of the State of California was timely filed and said Petition was denied June 28, 1967.

An Application for extension of time within which to file this Petition was filed with the Clerk of this Court on the 21st day of September, 1967 and was granted by Mr. Justice Abe Fortas on September 22, 1967, extending the time within which to file this Petition to and including October 25, 1967. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. Section 1257(3); 28 U.S.C. Section 2101(c), and the provisions of Rule 22.4 of the Revised Rules of the Supreme Court of the United States.

Questions Presented for Review.

After a Federal Agency (which Congress has charged with the responsibility of administering the Federal Low-rent Housing Program) has declared its contract in default, and by reason thereof has taken over possession, control and the administration of the Local Agencies projects and affairs, does:

(1) The Supremacy Clause of the United States Constitution require Local Courts to enforce the provisions of a uniform Federal Contract and declare void and unenforceable any contracts with individuals that are inconsistent with, or require the violation of such Federal Contract?

(2) The action amount to one against the United States with exclusive jurisdiction placed in either the Federal District Court or Court of Claims?

(3) The Local Court have jurisdiction to try the cause without making the Federal Agency a party to the action as an Indispensable Party?

(4) The right to audit and approve annually administrative expenditures prohibit the Local Authority from contracting with individuals for the performance of future Administrative services at a fixed amount for approximately seven years, without prior approval by the Federal Agency?

(5) The Local Agency have the right to divest itself of duties and obligations required to be preformed by Federal Statute and Contract in an employment agreement, which the Federal Agency has declared to be null and void.

Constitutional Provisions, Statutes and Regulations Involved.

The Constitutional provision involved is the Supremacy Clause of the Constitution of the United States (Article VI, Clause 2).

The Federal Statute involved is the United States Housing Act of 1937 (42 U.S. Code Sec. 1401 *et seq.*) The pertinent provisions are printed as Appendix B hereto.

The State statutes involved is the California Housing Authorities Law (California Health and Safety Code Sec. 34301 *et seq.*) The pertinent provision of which are referred to in the body of this petition or by footnote.

Statement of the Case.

A. The Purpose and Operation of the United States Housing Act of 1937 (42 U.S.C., Sec. 1401 et seq.) and Its Relationship With Local Agencies.

By the United States Housing Act of 1937 (42 U.S. Code, §1401, *et seq.*), Congress conceived the Federal low rent housing program to assist communities in providing safe, decent and sanitary housing for the lowest income groups of particular communities.

To qualify for the benefits under the U. S. Housing Act, each state is required to enact enabling legislation. In California this was done by the enactment of the California Housing Law in 1938 as set forth in Sections 34200-34402 of the California Health and Safety Code. In order for local communities to qualify under both the Federal and State law, the local governing body must by resolution declare a need for an authority to function (Sec. 34240 of the California Health and Safety Code). After the enabling resolutions have

been made and adopted the Public Housing Administration[1] makes available in various ways all capital funds necessary to build or construct the local project.

Basically, the Public Housing Administration provides the capital costs of a project, computes the interest on the bonds used to finance the project which are unconditionally guaranteed by the United States, and divides the total sum by 40 to determine the annual amount that may be required to be contributed by the Public Housing Administration.

The Public Housing Administration may make this grant only on the condition that the requirements of the U. S. Housing Act, as amended, are met. This Act, among other things, requires that each local authority enter into a standard form of annual contributions contract as was done in the instant case. Among the financial covenants and conditions of this contract are the requirements that:

> (1) The local authority shall at all times operate each project (a) solely for the purpose of providing decent, safe and sanitary dwellings (including necessary appurtenances thereto) within the fi-

[1]Under the authority of the Housing and Urban Development Act (5 U.S.C. 624) the Secretary of the Housing and Urban Development Administration created the Housing Assistance Administration (Secretary's Organization Order No. 12 dated June 23, 1966) and by Order effective July 1, 1966 (31 F.R. 8967) delegated the powers and authorities of the Secretary over the public low-rent housing program, with certain exceptions, to the Assistant Secretary for Renewal and the Housing Assistance Administration who, in turn, redelegated such powers to the Deputy Assistant Secretary for Housing Assistance effective July 1, 1966 (31 F.R. 8968).

Despite such changes, in order to avoid confusion and for purposes of consistency, however, the Public Housing Administration will still be referred to herein as the Federal agency charged with administration of the public low-rent housing program and in charge of the Appellant.

nancial reach of families of low income, and (b) in such manner as to promote serviceability, efficiency, economy and stability.

(2) All residual receipts or surplus must be paid to the Public Housing Administration or for its benefit.

(3) The local housing authority must operate within a proposed budget and it may not increase administrative expenses, among other things, without authority of the Public Housing Administration.

(4) If the local housing authority acts contrary to the annual contributions contract as determined by the Public Housing Administration, the improper expenditures may be disallowed, the contract declared in default, and title or possession of the projects relinquished to the Public Housing Administration.

By both the Annual Contributions Contract and State law, the Public Housing Administration has exclusive jurisdiction to determine whether or not a breach in the annual contributions contract exists or improper expenditure of funds derived directly or indirectly from the Federal Government has been made. In this regard, Section 407 of Part Two of the Annual Contributions Contract provides:

"The Local Authority shall not (1) at any time after the end of the Initial Operating Period for any Project incur any Operating Expenditures with respect to such Project except pursuant to and in accordance with an approved Operating Budget for such Project, nor (2) during any Fiscal Year or other budget period, incur with respect

to any Project total Operating Expenditures, nor expenditures for management expense, miscellaneous authority expense, establishment of reserves, or operating improvements in excess of the respective amounts therefor shown in an approved Operating Budget (including revisions thereof) governing such Fiscal Year or other budget period" . . .

This right of the Federal Government is specifically approved and set forth in Section 34327.5 of the California Health and Safety Code which states:

"Whether or not the type, amount, and manner of expenditure of any funds received by an authority from the Federal Government, or any funds derived from such funds, are in accordance with the law or contract under which the funds were received, or any applicable federal regulations, shall be matters to be determined exclusively by the federal agency. This section is not intended, and shall not be construed, to prohibit prosecution and conviction of violation of any law of this state."

Thus, the question as to whether or not the annual contributions contract has or has not been breached in the instant case is left solely to the determination of the Public Housing Administration. The Public Housing Commissioner took the position that the contracts were void and unenforceable and by reason thereof, the appellant had breached the contract.

B. Status of Petitioner.

Petitioner is a public corporation and was one of the first local housing authorities created in the State of California and qualified under the California Health

and Safety Code §3420, *et seq.*, enabling legislation known as the Housing Authorities Law.

Petitioner operates by and through five appointed commissioners to serve for staggered terms without compensation pursuant to §34272 of the California Health and Safety Code. The members of this commission are appointed by the Mayor of the City of Los Angeles.

The United States Housing Act of 1937 requires all local housing authorities operating under Federal loans to be a party to the standard form Annual Contributions Contract. Petitioner has been a party to such a contract since 1938. This contract which was attached to Petitioner's motion to join the Public Housing Administration as an indispensable party provided that the Public Housing Administration would lend to Petitioner the capital costs of its low rent housing projects by guaranteeing bonds issued and to be repaid over a period of forty years. That a part of the condition for obtaining such capital loans was that the Public Housing Administration had the right to approve expenditures contained in the annual budget of Petitioner for its administrative and project expenses for each fiscal year. The determination as to whether or not the type, amount, manner and expenditure of any funds received by Petitioner from the Federal Government or any funds derived from such funds, are in accordance with the law or contract under which the funds were received or any applicable Federal regulations are matters to be determined exclusively by the appropriate Federal Agency (California Health and Safety Code §34327.5.)

C. Facts Surrounding the Present Litigation.

At the time the complaint, subject of this litigation, was filed in the Superior Court of the State of California in and for the County of Los Angeles, the Public Housing Administration, the Federal Agency charged with the duties of the administration of the Housing Act of 1937, had determined that the contracts in question constituted a breach of the Annual Contributions Contract and had taken possession of all of Petitioner's housing projects and funds and was in active operation of Petitioner.

At the time that the contracts, subject of this litigation, were executed, Respondent Holtzendorff was then under contract to Petitioner to act as Executive Director with an annual salary of $17,500 to expire December 31, 1962 and Respondent Rosien was then under contract to Petitioner to act as Assistant Executive Director with an annual salary of $12,468 to expire December 31, 1963.[2]

On December 4, 1957, Respondent Holtzendorff was indicted by the Los Angeles County Grand Jury on multiple counts of embezzlement of public moneys and falsification of public records arising out of alleged orders and directions given to subordinates to use property and services of employees of Petitioner in support of the then Mayor Bowron's re-election campaign. After an appeal (*People v. Holtzendorff*, 177 Cal. App. 2d 788) based upon Respondent Holtzendorff's motion under California Penal Code Section 995 he was acquitted of the charges on November 14, 1960.

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[2]The employment contracts of Respondents, subject to the within action are set forth as Appendix E.

On November 29, 1960, Respondent Holtzendorff presented to the Commissioners of Petitioner a claim for reimbursement of legal fees and expenses in the amount of $36,537.17 incurred in connection with the defense of his prosecution which sum was paid by Petitioner November 30, 1960.

On April 19, 1961, new contracts containing similar provisions to the then existing contracts were entered into by the Petitioner and Respondents providing, however, for increase in annual wages of approximately $4,000 each. The term of said contracts was for over six years and eight months and these contracts by the last paragraph thereof rescinded the existing similar contracts. A majority of the terms of the then existing members of the Board of Commissioners of Petitioner had terms that were to expire prior to the dates of the then existing contracts and on July 2, 1962, four new commissioners of Petitioner were appointed.

On December 4, 1962 Respondents filed actions against Petitioner for declaratory relief concerning the validity of the contracts in question.

On March 26, 1963 Respondents were discharged from duty as Secretary and Executive Director and Assistant Secretary and Assistant Executive Director of Petitioner.

By letter dated April 16, 1963, Respondents were notified through their attorney, Herman F. Selvin, that Marie C. McGuire, Commissioner of the Public Hous-

ing Administration had taken possession of the Housing Authority of the City of Los Angeles, Petitioner herein.[3]

This action was commenced April 18, 1963 by the filing of the complaint for breach of contract and writ of mandamus and proceeded to trial on Respondents' amended complaint for breach of contracts and declaratory relief and Petitioner's answers thereto and Petitioner's cross-complaint filed May 4, 1964 and Respondents' answer thereto.

The cause was tried in two parts consisting of the trial of legal issues, the Court sitting without a jury, and the main trial on the factual issues, the Court sitting with a jury. At the conclusion of the main trial the jury awarded judgment in favor of Respondent Holtzendorff in the sum of $122,661 and Respondent Rosien in the sum of $85,538, a total of $218,199. By stipulation of the parties through their respective counsel, all matters introduced at the main trial and the trial of the legal issues, together with the proceeding in the case of *People v. Holtzendorff,* 177 Cal. App. 2d 788, the issues with respect to Petitioner's cross-complaint were submitted to the Court for decision sitting without a jury. Thereafter, the Court awarded a separate judgment for Petitioner against Respondent Holtzendorff in the sum of $36,537.17.

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[3]The Public Housing Administration was superseded by the Housing Assistance Administration on July 1, 1966 which remained and now is in possession of the low rent projects of Petitioner.

How the Federal Questions Were Raised and Decided Below.

The question as to whether the State Court had jurisdiction to try the cause without making the Public Housing Administration a party to the action was raised on two occasions by motions to join that Federal Agency as a party to the action. The first occasion was an oral motion made at the time of the hearing on Petitioner's Demurrer to the original complaint, which motion was denied May 10, 1963 [Clk. Tr. p. 17]. On November 1, 1963 the Trial Court granted permission for Petitioner to renew said motion. Pursuant thereto, Petitioner filed its notice of motion and supporting affidavits[4] upon this question and on May 10, 1964, said motion was again denied.

Following the entry of judgment by the Trial Court, Petitioner gave Notice of Appeal and among the assignments of error, argued to the California Court of Appeal the following:

I.

"THE COURT BELOW LACKED JURISDICTION TO TRY THE CONTROVERSY.

The Trial Court erred in denying Petitioner's motion to join the Public Housing Administration as an indispensable party to the action and was therefore without jurisdiction to try the controversy and that the Public Housing Administration in its current capacity

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[4]The Supporting Affidavit of Marie C. McGuire, Commissioner of the Public Housing Administration was extensively referred to in Respondents' Reply Brief, footnote No. 76, page 130 and for the convenience of the Court, has been attached hereto as Appendix No. C.

of holding possession of and operating Federally aided low rent projects of Petitioner is the real party in interst."

Petitioner further, in the California Court of Appeal, brought to the Court's attention that the failure to join the Public Housing Administration was a jurisdictional issue in the State of California and could be raised at any time even on appeal. In its Opinion, the California Court of Appeal held:

> "There is no merit in the Authority's argument that the federal Public Housing Administration (PHA) is an indispensable party to this action. The argument ignores one decisive fact—the subject matter of the action, which is the Authority's breach of a contract to which PHA was not a party and in which it had no justiciable interest of any kind[2] . . . Nor has PHA any interest at all, let alone one that would be jeopardized by a judgment 'between the parties.'"

This ruling was made despite the fact that both the Trial and the Appellate Court were presented with the "take-over agreement" whereby the Public Housing Administration took possession and operation of all of Petitioner's projects. The pertinency and legal effect of this agreement is more fully discussed hereafter, however, the same has been attached hereto as Appendix C.

The Federal interest in this litigation was the subject of a Stipulation between the parties in the Trial Court,

which Stipulation was set forth verbatim in Petitioner's Reply Brief before the California Court of Appeal at pages 51 and 52.[5]

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[5]Said stipulation provided as follows:

"The Court: I think it would be in order to have a stipulation stating the relationship between the Housing Authority and the Federal Government.

"Mr. Selvin: Well, I am prepared to offer a stipulation in that regard. The acquisition of the property and the construction of the building projects, as I understand it, are in the first instances financed either by loans from the PHA or by PHA's guarantee of loans made to the Housing Authority by private agencies, and repayment of those loans, of course, is an obligation of the local Housing Authority.

"In addition, for the purpose of enabling the local Housing Authority to charge low rents, there are annual contributions by the PHA or the Federal Government to the Housing Authority, thus in part subsidizing their operations.

"Rentals and other sources of income from the projects, as distinguished from the sources of income that are represented by the operation reserve fund, are used in the first instance to pay operating expenses.

"If there is any surplus, that surplus, as I understand it, is allocated to the PHA in payment or partial repayment of the loans that it has made or guaranteed. Those arrangements are represented by contracts between PHA and the Housing Authority, and pursuant to those contracts and to protect and administer the PHA fiscal interest in the operations of the Authority, there are provisions for these periodic audits and reviews. Very generally and somewhat sketchily, I think that is somewhat the situation, Mr. Hildreth.

"Mr. Hildreth: I think the statements are substantially correct. However, your Honor, with the one correction that the surplus, that is to say, if the Housing Authority operates at a profit, which creates a surplus, this money is accredited to the Federal Government. They get the money—rather, they reduce the annual contributions contract so that they have a direct economic interest.

"Mr. Selvin: I thought I mentioned that the surplus went to the Federal Government. If I didn't make it clear, I accept your clarification of it." . . . [Rep. Tr. p. 648, line 13, to p. 649, line 24.]

"Mr. Hildreth: Excuse me before we go into that. I planned to offer some additional evidence. I am informed that there are two contracts, one of which, the surplus goes directly to the Federal Government, and the other, the sur-

These matters were presented to the California Supreme Court in Petitioner's Petition for Hearing and which hearing was denied June 28, 1967.

REASONS FOR GRANTING THE WRIT.

A. The Rendition of This Judgment, the Enforcement of Which Requires the Breach of Federal Statute and Contract, Conflicts With Prior U.S. Supreme Court and Circuit Court Decisions Interpreting and Applying the Supremacy Clause.

Petitioner contends that the decision of the California Court of Appeal is in irreconcilable conflict with an unbroken line of decisions by the U.S. Supreme Court commencing with *Gibbons v. Ogden,* 9 Wheat. 1, 211, 6 L. Ed. 23, through such recent decisions as *Sperry v. Florida Ex rel. Florida Bar,* 373 U.S. 379 and *Leslie Miller, Inc. v. Arkansas,* 352 U.S. 187.

The Opinion of the California Court of Appeal has placed Petitioner's present Board of Commissioners in the untenable position of being charged with the payment of a judgment out of low rent housing authority funds over which they do not have control. The expenditure of these funds is subject to and under the control of the Public Housing Administration which has declared that the contracts in question were void

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plus goes to reduce their amount to the Authority so that there is that minor distinction.

"The Court: All right.

"Mr. Selvin: Instead of shipping the money to Washington and getting it back from Washington in the form of a check, they simply reduce the check that Washington sends out.

"Mr. Hildreth: That is correct.

"Mr. Selvin: I will accept that." . . . [Rep. Tr. p. 650, lines 5-17.]

and unenforceable and that no low rent funds could be used to discharge any such contractual obligations.

The California Court by not recognizing the interests of the Public Housing Administration and making it a party to this action, has created this impossible situation.

Petitioner moved to join the Public Housing Administration on May 10, 1963 and again with the permission of the trial court on May 21, 1964. These motions were denied which were error.

Section 389 of the California Code of Civil Procedure provides:

> "A person is an indispensable party to an action if his absence will prevent the *court from rendering any effective judgment between the parties* or would *seriously prejudice any party before the court* or if *his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.*" (Emphasis added.)

Enforcement of the California Court of Appeal decision in the present case necessarily conflicts with Federal statute and contract. Petitioner, acting through its Commissioners on the one hand, are required by this judgment to pay the same through the use of Federally audited, controlled and possessed funds. To do so would require the Commissioners to act contrary to the determination of the Commissioner of the Public Housing Administration, its Federal Annual Contributions Contract, and the use of funds over which they do not now or have ever had the ultimate right of control. The fact that the Annual Contributions Contract was breached by the execution of the Respondents' em-

ployment agreements has never been challenged but was always brushed aside by both the California Trial and Appellate Courts as immaterial and was never considered. The plain effect of the California decision is to interpret the Federal contract and its enabling statutes contrary to the interpretation put upon the statute and the contract by the Federal Agency which is given exclusive jurisdiction to so interpret by both State and Federal statute.

Certainly the decision of the California Court of Appeal is contrary to intent of Congress in passing the United States Housing Act of 1937 and the ruling of *Johnson v. Oakland Redevelopment Agency* (1962, 9th Cir.), 317 F. 2d 872.

See also:

Free v. Bland, 369 U.S. 663;

Public Utility Commission of California v. United States, 355 U.S. 543.

The effect of the California Court of Appeal decision was to allow local commissioners to disregard the Federal Agency contracts and Federal Statutes in the expenditure and control of funds and policy, contrary to a prior determination of the Federal Agency involved.

Recognizing the application of the Supremacy Clause, and acknowledging that the prior commissioners of Petitioner by merely entering into a written employment contract could wholly defeat the rights and obligations reserved to a Federal Agency, the California Court of Appeal has ruled that the ordinary law of contracts in the State of California shall prevail over Federal Statute and contract as construed by Federal courts and agencies. The California Court of Appeal accomplished

this result by finding that the Public Housing Administration "had no justiciable interest of any kind" . . . "nor" any interest at all, let alone one that would be jeopardized by a judgment "between the parties."[6]

This result was further made possible by refusing to make the Public Housing Administration a party to the action, recognizing the fact that the Federal agency was in actual possession and control of Petitioner's projects and operations or the impelling and overriding interest in the low-rent housing program for which all funds are Federally supplied. It is Petitioner's contention that this finding is in error as discussed hereafter.

B. In Fact and in Law the Judgment of the California Court of Appeal Is a Judgment Against the United States Rendered in Its Absence.

This Petition is predicated on a judgment which is in fact and law one against the United States rendered by the California State Courts without jurisdiction to entertain the action.

Prior to filing this action, Marie C. McGuire, then Commissioner of the Public Administration, had declared that a substantial breach existed in the Annual Contributions Contract between Petitioner and the Public Housing Administration. Pursuant to this declaration, Petitioner, by Resolution dated April 11, 1963 and by contract[7] dated April 12, 1963, transferred and de-

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[6]Decision of the California Court of Appeal Appendix A, pages 31 and 32.

[7]Relevant parts of said contract Appendix C provides:

"1. In accordance with the applicable provision of said Contracts federal financial assistance contracts) the local

livered possession of all of its Federally aided and assisted projects to the Public Housing Administration. From that date to the present the Public Housing Administration was and is the Housing Authority of the City of Los Angeles. Respondents Holtzendorff and Rosien were notified of this action by letter dated April 16, 1963 through their attorney, Herman F. Selvin, two days prior to the filing of the complaint for breach of contract and subject of the judgment rendered against Petitioner. At the time the suit was filed, appeal heard, and now, all powers, rights and duties of Petitioner were vested in and exercised by the United States acting by and through the Commissioner of the Public Housing Administration. Petitioner has at all times been without power to honor the judgment rendered; only the Public Housing Administration or its successor in interest can do so.

Authority hereby delivers to Public Housing Administration possession of the said Projects as constituted on the date of the aforementioned resolution, including all real property with all easements, rights-of-way, and all incorporeal hereditaments there unto belonging or in anywise appertaining, and all personal property, tangible and intangible, or interest therein held in connection with such projects, including (but not limited to) equipment and apparatus, supplies, monies on hand and on deposit, reserves, securities, accounts receivable, choses in action, leases, contracts books of account, papers and records, and the Public Housing Administration hereby accepts such delivery and possession.

"2. During the period in which the Public Housing Administration holds possession of the Projects it may, in the name of and on behalf of the Local Authority or in its own name and on its own behalf, exercise any or all of the rights and privileges of the Local Authority pursuant to the Contracts and perform any or all of the obligations and responsibilities of the Local Authority pursuant to said Contracts . . ."

The Judgment Rendered in the Court Below Is One That Would Be Paid by the Public Housing Administration and Actually Would Come From the Treasury of the United States.

The Opinion of the California Court of Appeal overlooks the fact that the U. S. Housing Act (42 U.S.C. Sec. 1421a(c)), and Part Two of the Annual Contributions Contract, Sec. 424, provide that the faith of the United States is pledged to the payment of the annual contributions to the local authorities. Further, no action or inaction by petitioner, whether *ultra vires,* illegal or irresponsible, can relieve the Public Housing Administration of this obligation.

Eeach local housing agency is subject to a periodic audit and in addition to being required to maintain the basic policies of the United States Housing Act, it is required to show that it is operated in a manner so as to promote serviceability, efficiency, economy and stability. This audit further determines the amount of the excess of income received over the actual costs of operation.

The amount of monies needed to pay off the petitioner's bonded indebtedness, annually appropriated by the Congress of the United States as annual contributions, is drastically affected by the efficiency of the operation of the projects by petitioner. Thus, any expense of the local housing authority comes out of the Treasury of the United States. The fact of this interest of the Public Housing Administration was before the court by a stipulation between the parties as more particularily set forth hereafter.

It is uncontroverted that the salaries of both Holtzendorff and Rosein were properly chargeable to the

general funds of the low-rent projects. This judgment, if enforced would thus be chargeable against funds received from the Public Housing Administration within the meaning of Section 1410 of the U. S. Housing Act. The amount of surplus would be lost to the Public Housing Administration forever as well as the amount required for the depletion of the authorized reserves.

The financial interest of the Public Housing Administration in the operating expenses as well as all other expenses of petitioner gives it a direct interest in the existence and validity of the "employment contracts" in issue in this suit. This is recognized and protected in such explicit detail as to render the Public Housing Administration an indispensable party to this suit.[8]

The effect of this judgment is obvious. The Public Housing Administration will be required ultimately to pay it without even having had the opportunity to be a party before the court.

This Action Was Brought in the Wrong Forum.

The jurisdiction for suits against the United States is set forth in 28 U.S.C. 1346(2) and 28 U.S.C. 1491

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[8]The sections of the U. S. Housing Act recognizing and protecting the interest of the Public Housing Administration are as follows: 41 U.S.C. Section 1402(1), defines low-rent housing to be that developed and administered to promote serviceability, efficiency, economy and stability; Section 1410(a), (b), (c) and (f), sets forth the authorization for the annual contributions in assistance of low-rent housing projects and the conditions therefor; Section 1413(a) provides for the foreclosure of any property or the enforcement of any right conferred by any law, contract or other agreement or take possession of any project in connection with which it has made a loan account contribution or capital grant; Section 1415(3) provides for the right to insure the low-rent character of housing projects by reducing or terminating the annual contributions payable under an annual contract in the event of a substantial breach of a condition of that contract.

(2) and only courts having jurisdiction of the subject matter would be the U.S. District Court or the U.S. Court of Claims.

Clearly, once the Public Housing Administration had declared a breach existed in the Contractual relations between Petitioner and that agency and had taken possession and control of all Petitioner's projects, that Agency was the real party in interest to this litigation, and in fact the Housing Authority of the City of Los Angeles.

Under these circumstances it is respectfully submitted that this action was one against an agency of the United States and as such the California Courts had no jurisdiction to entertain it. The action properly belongs in either the United States District Court or Court of Claims.

C. The United States Housing Act Requires the Public Housing Administration to Carry Out the Intent and Policy Declared by Congress Which Is More Than a Mere Economic Interest.

Thousands of persons reside in the low-income projects, which generally provide the only decent housing available to them because of their poverty. The purpose of federally supported low-income housing is set forth in 42 U.S.C. §1401:

> "It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and

> their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and unsanitary housing conditions and acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural non-farm areas, that are injurious to the health, safety and morals of the citizens of the nation . . . It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority) with due consideration to accomplishing the objectives of this chapter while effecting economies."

The Public Housing Administration had not only the right to complain about Respondents employment agreement from the financial respect but also the abdication by Petitioners former Commissioners of their duties and responsibilities. That Federal Agency has no right to contract with individuals to perform the functions of administering the low-rent program and in turn the local Authority may not do so either. The employment agreements, Appendix E, on this subject state:

> "The powers, duties, and functions of the employee shall be administrative only and at all times shall be in accordance with the By-Laws and Manual of Policy as established or changed by the

Commissioners from time to time. *However, in this connection, it is mutually understood and agreed that the nature and scope of said administrative duties will neither be increased nor decreased during the period of this Agreement without the written consent of the employee."* (emphasis added).

The provision of changing the nature or scope of the administrative duties without the consent of plaintiff divests future commissioners of the power expressly given them in Section 34275 of the California Health and Safety Code. It, in fact, precludes the future commissioners from amending the By-Laws of the defendant public corporation or the Manual of Policy concerning the operation of the commission.

As more particularly shown hereafter, it is the duty of the commission in office from time to time to exercise sound discretion to operate the Housing Authority in the best public interest. This, by the very nature of the duty requires that the Housing Authority examine from time to time its operation and to make such changes as necessary in the public interest, which changes would necessarily include the modification of the duties of the executive director and assistant executive director, due to the changes of conditions or circumstances certainly not reasonably foreseeable at the time the contract was executed. To say that the operation of the Housing Authority must remain static for a period of six years or perhaps longer certainly must be declared void in light of the quoted companion sections.

D. By Reason of the Annual Contributions Contract the Public Housing Administration Has a Direct and Basic Interest With Respect to the Efficient Operation of Each Project and to See That the Projects Are Operated in a Manner to Promote the Purpose of the United States Housing Act.

The right of the Public Housing Administration to approve or disapprove contracts involving the expenditure of low rent housing funds is not limited to the financial interests of that agency. There is an equally compelling reason why the Public Housing Administration should be joined as an indispensable party in litigation of this nature. The low rent housing program as conceived and promulgated by the United States Housing Act of 1937 (42 U.S.C. 1401, *et seq.*) charges the Public Housing Administration with the duty of seeing that local agencies operate their low rent housing programs in an orderly, efficient and economical manner. To that extent the Board of Commissioners of each local Authority and their executive officers must be guided by the advice, counsel, rules, and regulations of the Public Housing Administration.

As further evidence of the intent of Congress that the Public Housing Administration should be charged with the public duty requiring it to be ultimately responsible for the carrying out of the public low-rent housing program, Section 22 of the United States Housing Act of 1937 (42 U.S.C. 1421a) provides for the inclusion in every Annual Contributions Contract entered into between the Public Housing Administration and a Local Housing Authority of a requirement that:

> ". . . upon the occurrence of a substantial default in respect to the covenants or conditions to which

the public housing agency is subject (as such substantial default shall be defined in such contract), the public housing agency shall be obligated at the option of the Authority, either to convey title in any case where, in the determination of the Authority (which determination shall be final and conclusive), such conveyance of title is necessary to achieve the purposes of this Act, or to deliver possession to the Authority of the project, as then constituted, to which such contract relates: . . ." ["Authority" as used above refers to the Public Housing Administration and "public housing agency" refers to a local housing authority.]

In accordance with such requirement, such a provision was included in the Annual Contributions Contracts entered into between the Public Housing Administration and petitioner covering their low-rent projects.

In accordance with said statutory and contractual provisions an agreement was entered into between the petitioner and the Public Housing Administration under date of April 11, 1963, whereby the petitioner transferred possession and control of all its public low-rent housing projects to the Public Housing Administration. Under the provisions of said agreement Public Housing Administration has been in possession and control of said projects from that date until the present time, and is still in possession and control of such projects, charged with the sole responsibility and authority for their management and operation and authorized to exercise any or all of the rights and privileges and to perform any or all of the obligations of the petitioner in connection with such projects.

It is perhaps appropriate here to call the Court's attention to the provision of the disputed "contract" whereby the Board of Commissioners was prohibited during the term of such "contract" from either increasing or decreasing the duties of the Executive Director without his consent. As stated the position of the Executive Director in the similar case of *Mitchell v. Chester Housing Authority,* 389 Pa. 314, 132 A. 2d 873 (878), "His relationship to the Authority was so close and so confidential that it may be said that, for most purposes, he was in fact the . . . Housing Authority in action."

This low-rent housing program cannot be efficiently and successfully conducted unless there exists a mutual confidence and the highest degree of cooperation between the Executive Director and the Board of Commissioners. To allow such a contract as this to be entered into which would extend into a period when such mutual confidence and cooperation no longer existed would certainly most seriously hamper this program in which, not only the State of California, but the Federal Government as well as such a vital interest. It is very clear from the evidence in this case that such confidence and cooperation no longer existed between the Board of Commissioners and the former Executive Director and his Assistant for some months before their services were terminated.

It is respectfully submitted that the Public Housing Administration, having been created for the purpose of administering the low-rent housing program in furtherance of the general welfare of the nation, is an indispensable party to this proceeding because the very issue to be resolved is whether, in fact, the Housing

Authority was being operated in a manner consistent with the purposes and objectives of the low-rent program. It is further submitted that the issue to be resolved will affect not merely the individual litigants to this action, but will have a far-reaching effect on the low-rent program throughout the nation. Such considerations, we respectfully submit, make it mandatory that the Public Housing Administration be joined in this action.

Compare *National Licorice Co. v. National Lab. Rel. Board,* 309 U.S. 350, 84 L. Ed. 799 (1940). In that case one of the questions presented was whether the National Labor Relations Board had the authority, even in the absence of the employees as parties to the proceeding, to order an employee not to enforce contracts with its employees found to have been procured in violation of the National Labor Relations Act and to contain provisions violating that Act. In determining that the Board had such authority, the court gave considerable weight to the fact that the "Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining" (309 U.S. at 362, 84 L. Ed. 810). The opinion continues (309 U.S. at 363-364, 84 L. Ed. 810):

> "In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. * * *
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> "Here the right asserted by the Board is not one arising upon or derived from the contracts be-

tween petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices * * *."

Compare also *Scripps-Howard Radio v. Federal Commun. Com.*, 316 U.S. 4, 86 L. Ed. 1229 (1942) and *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 81 L. Ed. 789 (1937) where the Supreme Court recognized the courts as "instruments for realizing public purposes" (316 U.S. at 15, 86 L. Ed. at 1237) and noted that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved" (300 U.S. at 552, 81 L. Ed. at 802).

In the instant case, the Public Housing Administration is the "responsible administration of the properties involved" because it has taken actual possession of the property under Section 501 of the Annual Contributions Contract. Under the provisions of Section 505 of the Contract, during the period in which the Public Housing Administration holds possession "it may, in the name of and on behalf of the Local Authority or in its own name and on its own behalf, exercise any or all of the rights and privileges of the Local Authority pursuant to this Contract and perform any or all of the obligations and responsibilities of the Local Authority pursuant to this Contract."

It is essential that the housing be operated as economically and efficiently as possible so that the lowest income group in the community may be served. An inefficient, uneconomical operation will result in higher

operating costs and a possible deficit. Operating costs are the responsibility of petitioner and will not be borne by the Public Housing Administration. In the event of an operating deficit, petitioner will be required to either reduce operating expenses or increase the rents paid by the low-income tenants. Any increase in rents affects and endangers the low-rent character of the projects. An operating deficit may result in such an increase in rents as to cause the projects no longer to be operated as low-rent housing and, consequently, constitute a breach of the Annual Contributions Contract. Furthermore, if the projects are not operated with efficiency and economy, even though it might still be possible to operate them as low-rent housing, this would also constitute a breach of such contract. (Section 201 of Part II of the Annual Contributions Contract.)

This interest and the basic right to protect it is demonstrated by the right of the Public Housing Administration to conduct annual audits of the local authorities with respect to rents or revenues received from the projects.

It is true that Public Housing Administration has no right to dictate to the Commissioners of petitioner as to the person they shall appoint as executive director. The authority to make such appointment is solely within the discretion of the Commissioners. However, when the relationship between the executive director and the Board of Commissioners deteriorates to such

an extent that the projects cannot be operated in such a manner as to promote serviceability, efficiency, economy and stability and such operation is in danger of not being within the financial reach of families of low income, then the annual contributions contract has been violated. (See Section 20, Part II of the Annual Contributions Contract). The Public Housing Administration then very definitely has an interest in remedying such a situation.

The Federal Government has the power to audit and approve all expenditures made in connection with funds received from low rent housing projects. The Federal Agency having taken the position that the personal service "contract" was a breach of the Annual Contributions Contract and by virtue of the California Health and Safety Code, Sec. 34327.5 which grants the exclusive determination of this question to the Federal Government, it appears axiomatic that the Public Housing Administration is an indispensable party to this action.

The rule in California as enunciated by the California Supreme Court since the very early cases of *Berryman v. Perkins,* 55 Cal. 483 and *Cosner v. Colusa County,* 58 Cal. 274, has always been that the right to approve action specifically implies the right to disapprove said action. This rule applied to the instant litigation would thus give the Public Housing Administration the right to disapprove of the salaries and other matters relating to the employment contracts of

Petitioner's Executive Director and Assistant Executive Director.

Conclusion.

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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